United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1856

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERWINE LAVERNE and ESTELLE LAVERNE,

Appellants,

- against -

HOWARD J. CORNING, JR., Mayor, et al

Appellees.

B

P/S

REPLY BRIEF

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Appellants,	:	
- against -	:	
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Appellees,	:	
	X	

STATEMENT OF FACTS

Only a brief reply to Appellees' brief is necessary. Their brief totally fails to respond to the substantial arguments made in Appellants' brief. In those few instances when Appellees' do respond their arguments show a lack of understanding of the legal arguments in this case and contain language which obfuscates the issues.

Appellees assert that the decision in People v. Laverne, 14 NY2d 304(1964)(A.at118) "was the first time a court anywhere had held an ordinance of this type ... unconstitutional" (Appellees' Brief at 8).

However, a reading of the opinion in People v. Laverne, supra makes it clear that the New York Court of Appeals was not establishing new law, but was rather relying

on established black letter law that requires the use of warrants when a search has as its purpose the obtaining of evidence to be used in criminal prosecutions. And the Court of Appeals found that the searches conducted by the Appellees were, in fact, carried out for the purpose of gathering evidence for criminal prosecutions (A-123).

These searches were invalid under the law at the time they were undertaken and the decisions of Frank v. Maryland, 359 U.S. 360 (1959) and Ohio ex rel. Eaton v. Price, 36 4 U.S. 263(1960) never gave Appellees the constitutional right to search without a warrant for evidence to be used in criminal prosecutions.

Moreover, People v. Laverne, supra was not the only New York decision which held that these searches were unconstitutional because they were made to gather evidence for criminal prosecutions. In a later decision reversing the contempt convictions the New York Court of Appeals unanimously so held. Incorporated Village of Laurel Hollow v. Laverne Originals, Inc. 17 NY2d 900 (1966) affirming 24 AD2d 616(1965). And the Appellate Division so held in reversing the penalties imposed upon the Lavernes. Incorporated Village of Laurel Hollow, v. Laverne Originals, Inc. 24 NY2d 615(1965).

These cases were not estalbishing new constitutional precedents. Rather these many judgments were reversed

because the New York courts found that the purpose of the searches was not administrative, but was in fact to gather evidence for criminal prosecutions. No precedents have ever countenanced warrantless searches for such a purpose.

POINT I

Appellees totally mislead this Court by their assertion that Professor Prosser considers the common law rule holding a public official absolutely liable for a trespass as "highly artificial and unreasonable" and a rule which only "survives in New York." Appellees Brief at 22.

Professor Prosser says nothing of the kind regarding the rule that a public official who acts under an invalid privilege does so at his own peril. Rather the "highly artificial" rule he is criticizing is the law, now even abandoned in New York, that imposed liability "for invasions of property which were neither intended nor negligent." For example, Professor Prosser says

> if, without negligence, he felled a tree, or dammed a stream, or operated a street car upon his own property, and his act resulted in the tree, stream or car going directly upon the land of another, he was liable for the consequences. W. Prosser, Law of Torts at 64 (3d ed. 1964) (emphasis added)

This "highly artificial" rule has no applicability to this case. The Appellee-defendants intended to go upon the Lavernes premises. Therefore, all of Appellees quotations from Prosser regarding unintended intrusions are irrelevant.

Rather than giving any support to Appellees position Professor Prosser supports the view of every commentator and all of the cases that when the privilege to enter upon another's land is held invalid, there is no defense and the person is liable as a trespasser. As he states:

> However valid the excuse may be under the criminal law, in a civil action one who intentionally interferes with the person or property of another does so at his peril and must assume the risk that he is wrong. W. Prosser, supra at 100.

As stated in Appellants brief, the universal rule* is that a public official who is not a police officer, is absolutely liable for trespass despite a reasonable belief that the privilege conferred is valid. Restat 2d, Torts, Section 164; Harper & James, The Law of Torts, Section 1.4 ; Mulligan v. Martin, 125 Mo. A. 630, 102 S.W. 59(1907).

*As Appellants point out in their brief it makes no difference whether we look to the common law of New York or the prevailing common law in the United States. The defenses available or not available are the same.

Nor is it anomalous to hold a public official absolutely liable for a trespass while granting a reasonable belief defense to a police officer making an arrest. Again as is discussed in Appellants brief police officers are given the defense because of the speed and danger with which they must carry out their tasks and the strong public interest in enforcement of the criminal law.

But the situation is very different with regard to public officials supposedly carrying out administrative duties. They generally have the time, to either get a warrant or as in this case, apply for a court order allowing inspection. Moreover, the interests such administrative officials protect are not of the same magnitude as the interests protected by a policeman who is pursuing serious violators of the criminal law. Thus, there is every reason for giving a policeman a reasonable belief defense while not giving such a defense to an administrative official.

Finally, appellees claim that application of this strict liability for trespass rule is an absurdity because under Appellants argument

> Appellees could have asserted good faith as a defense if they had, in addition to their search, arrested the Lavernes, but cannot assert such a defense because they merely conducted a search. Appellees' Brief at 22-23

This claim totally blurs the destinction between a police officer and an administrative official. Had Appellees been police officers pursuing violators of the criminal law they would have a good faith defense to either a search or a search and an arrest. This is so because in their capacity as police officers they are vindicating the important societal interests spoken of above.

However, the situation postulated by Appellees can never arise with regard to administrative officials like Appellees. Such public officials have no power to make arrests. It is for policy reasons that the defenses available to such public officials are different than those available to police officers. A distinction between the defenses available to a police officer for a search or a search and an arrest would be absurd. But a distinction between the defenses available to a police officer and an administrative official who has no power to arrest is supported by both reason and precedent.

POINT II

Appellees claim that the decision in People v. Laverne "does not operate as collateral estoppel on the issue of good faith since good faith was never litigated in that case." Appellees Brief at 24. From this statement it is difficult to know whether or not Appellees even read Appellants' brief.

Appellants' do not claim that the issue of good faith was litigated in State courts. Rather, it is Appellants' argument that the key factual issue necessary to establish a good faith defense was found against the Appellee - defendants in the State courts, and that this factual issue could not be relitigated in Federal Court.

To establish their defense Appellees had to prove that the searches they undertook had a reasonable basis in the law "in effect at the time their actions took place." Preston v. Cowan, 369 F.Supp. 14,20(W.D.Ky.1973).

The New York Court of Appeals decided on two separate occassions that the searches by Appellees were carried out for the purposes of criminal prosecutions People v. Laverne 14NY2d304(1964); Incorporated Village of Laurel Hollow v. Laverne, 17NY2d900(1966) affirming 24AD2d616(1965). This latter Court of Appeals decision was unanimous. Once this fact was established in the state courts there was never any doubt that the searches were illegal.

No precedents then and none today permit warrantless searches for the purpose of gathering evidence for criminal prosecutions.

Thus, Appellees entire argument in Federal Court which claimed that the searches were authorized by Frank v. Maryland, 359US360(1959) was irrelevant. While certain administrative warrantless searches were authorized by that case, these were not the type of searches carried out by Appellees in this case. There was never any basis in existing law, much less any reasonable basis for believing that warrantless searches for criminal purposes were authorized. Appellees should not have been permitted to relitigate the already established fact that the searches of the Laverne home were for the purpose of gathering evidence for criminal prosecutions.*

*This is not to say that everytime a search is held illegal in State court, a plaintiff can automatically recover in a Federal Court. Usually, the State Court will determine that certain facts which are brought out at a hearing do not constitute probable cause. In a subsequent civil suit a police officer could still argue that those facts gave him a reasonable belief in the validity of the search and principles of collateral estoppel would not preclude him from so proving.

AFFIRMATION OF SERVICE

Michael Ratner an attorney duly admitted to practice in the State of New York under penalty of perjury affirms that on the 8th day November 1974 he served the within Reply Brief upon Mudge, Rose, Guthrie & Alexander attorneys for Appellees in this action, at 20 Broad Street, New York, New York the address designated by said attorneys for that purpose by depositing a true copy of same in a properly addressed wrapper in an official depository of the United States within the State of New York.

Michael Ratner

MICHAEL RATNER